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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL TAROLA,

Defendant and Appellant.

F068334

(Super. Ct. No. F13905696)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Elisa A. Brandes, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and John G. McLean, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Gomes, J. and Franson, J.

Michael Tarola was convicted of felony assault with a deadly weapon, with an enhancement for personal infliction of great bodily injury. At trial, the complaining witness implied that (1) a third party had attempted to dissuade him from testifying in the case and (2) that Tarola was a gang member. Appellant claims to have suffered unfair prejudice as a result of this information being conveyed to the jury. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On May 31, 2013, Gerald Escalante was stabbed by two assailants while sitting in a parked car in a residential area of Coalinga. Michael Tarola was identified as one of the perpetrators and charged with one count of assault with a deadly weapon (Pen. Code,¹ § 245, subd. (a)(1)). An enhancement allegation was attached to this count for personal infliction of great bodily injury within the meaning of section 12022.7, subdivision (a). The charges were tried before a Fresno County jury in September 2013.

Prosecution Case

The victim, Mr. Escalante, testified to meeting Tarola approximately one month prior to the subject incident. He had mistaken Tarola for a man named “Cory,” whom he believed had been making advances towards his girlfriend, and challenged Tarola to a fight. After realizing Tarola was not his girlfriend’s would-be suitor, Mr. Escalante apologized and offered to shake hands. Tarola refused the gesture. The men crossed paths again one or two weeks later outside of a liquor store. Mr. Escalante made a second apology and explained that he had been, and still was, looking for a man named Cory. Tarola replied, “You might as well be looking for me too.”

Mr. Escalante’s third encounter with Tarola occurred while he was buckled into the front passenger seat of his friend Armando Campos’s car. Mr. Campos was parked outside the home of a man named Steven Francis, who had come out to the car to speak

¹ Unless otherwise specified, all further statutory references are to the Penal Code.

with him. As Mr. Campos conversed with Mr. Francis from the driver's seat, two men approached the opposite side of the vehicle and began stabbing Mr. Escalante with knives through an open window. The victim recognized his attackers, but did not know their names at that time.

Mr. Escalante was hospitalized for treatment of multiple puncture wounds to his chest. While in the hospital, he spoke with a detective from the Coalinga Police Department and identified his attackers from photographic lineups. The information he provided led to the arrest of Tarola and Tarola's brother, Cameron Clark.² At trial, the victim identified Tarola in court and testified he was absolutely certain the defendant had stabbed him on the night in question.

The police interviewed Armando Campos and he, too, identified Tarola as one of Mr. Escalante's assailants. At trial, Mr. Campos recounted details of the attack and made an in-court identification of Tarola. The third eyewitness, Steven Francis, also told police that he had seen Tarola and his brother assault the victim, but revised his story in court. Mr. Francis testified to being present when Tarola had an "argument" with the passenger in Armando Campos's car, but denied witnessing any acts of violence.

Testimony from law enforcement officers established that police had executed a search warrant at the residence of Tarola's brother and seized two knives from inside of the home. One of the knives was found in the brother's bedroom, and the other was located on, or inside of, an "old pizza box" in the kitchen oven. The search further uncovered what appeared to be bloody clothing, as well as miscellaneous items connecting Tarola to the house, including a paystub and a temporary California identification card.

² Mr. Clark was prosecuted separately and is not involved in this appeal.

Defense Case

Detective Andrew Diaz of the Coalinga Police Department was called to testify about statements made to him by Armando Campos over the course of two interviews. More specifically, Detective Diaz was asked to confirm that Mr. Campos had previously estimated Tarola's height to be around 5'10" or 5'11," and had indicated that he "did not get a very good look at [him]." The detective was then asked to stand next to Tarola and provide his own approximation of the defendant's height. Detective Diaz gave an estimate of 5'6" or 5'7". According to documents in the clerk's transcript, Tarola is 5'3" tall. The defense rested at the conclusion of Detective Diaz's testimony.

Verdict and Sentencing

Tarola was found guilty as charged. The trial court imposed a seven-year prison sentence comprised of the upper term of four years for the section 245 offense and three years for the great bodily injury enhancement. This timely appeal followed.

DISCUSSION

Evidence of Witness Intimidation

Background

Defense counsel moved in limine to preclude testimony concerning witness intimidation efforts, including the victim's allegation that a stranger had come to his home after he was released from the hospital and threatened him at gunpoint, saying, "You better keep Mike and Cameron's names out of your fucking mouth. You better not testify in this case" The prosecution argued that the incident explained why Mr. Escalante had been uncooperative at the preliminary hearing, when he testified to having no recollection of how the stabbing had occurred. The trial court ruled that evidence of the alleged incident would be relevant to explain inconsistencies between Mr. Escalante's statements at the preliminary hearing and his anticipated trial testimony.

On direct examination at trial, Mr. Escalante was asked if anything happened to him on the day he was discharged from the hospital. He responded affirmatively, and

proceeded to explain how an unidentified man had come to his apartment and pointed a gun at his head. When asked if the gunman made any statements, the witness replied, “I don’t recall.”

In an effort to preempt impeachment of the victim on cross-examination, the prosecutor elicited an admission regarding the falsity of his testimony at the preliminary hearing. However, in response to certain follow-up questions, Mr. Escalante disavowed the notion that his testimony had been influenced by the incident with the gunman, and expressly denied being fearful of testifying against the defendant. Mr. Escalante said that he lied at the preliminary hearing because it was “not [in his] nature to go snitch on people.”

During a break in the victim’s testimony, defense counsel moved for a mistrial on grounds that Mr. Escalante’s rejection of the prosecution’s theory that he feared retaliation effectively destroyed the relevance of the alleged incident with the gunman. The trial court denied the motion, finding the challenged testimony could be relevant to others issues and concluding that regardless of its relevance, the evidence was not prejudicial. The court later gave a limiting instruction pursuant to CALCRIM No. 303 which admonished the jury to consider testimony of alleged acts of witness intimidation “only to explain why a witness may have changed his or her description of an event.” On appeal, Tarola claims the trial court’s failure to declare a mistrial was reversible error.

Analysis

“[A] motion for mistrial should be granted only when ““a party’s chances of receiving a fair trial have been irreparably damaged.””” (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) The denial of such a motion is reviewed under the deferential abuse of discretion standard. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.) ““Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.”” (*Ibid.*) The erroneous denial of a mistrial motion is prejudicial only if it is

reasonably probable that, but for the admission of the material upon which the motion was based, the defendant would have obtained a more favorable outcome. (*People v. Welch* (1999) 20 Cal.4th 701, 749-750 [denial of mistrial based upon the erroneous admission of evidence is reviewed for prejudice under the ‘reasonable probability’ standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).].)

Tarola’s argument for reversal relies on *People v. Weiss* (1958) 50 Cal.2d 535, which recognized that “[e]fforts to suppress testimony against himself indicate a consciousness of guilt on the part of a defendant, and evidence thereof is admissible against him.” (*Id.* at p. 554.) However, “[i]f the attempt is made by a third person, not in the presence of a defendant or shown to have been authorized by him, it should at once be suspect ... The wilful [*sic*] offering of such evidence might well form the basis for declaring a mistrial ... or for reversal on appeal if the case is not so strong” (*Ibid.*)

Tarola further relies on an opinion from this district entitled *People v. Pitts* (1990) 223 Cal.App.3d 606 (*Pitts*), wherein the admission of witness intimidation evidence was deemed erroneous and prejudicial in the absence of proof that the defendants engaged in the intimidation efforts or had authorized third parties to so act on their behalf. (*Id.* at p. 781.) We note, however, that *Pitts* involved a plethora of errors stemming from gross prosecutorial misconduct and failures by the trial court to maintain control over the proceedings. (*Id.* at pp. 815-816.) Under the unusual circumstances of that case, the evidence tending to show defendants’ guilt was not strong enough to overcome the cumulative prejudicial effect of judicial error and prosecutorial misbehavior. (*Id.* at pp. 816-817.)

Here, since the prosecution made no attempt to use evidence of witness intimidation to prove consciousness of guilt, respondent submits that the challenged testimony was admissible in relation to Mr. Escalante’s credibility even in the absence of a connection between the defendant and the alleged intimidator. This argument finds support in recent case law. As stated in *People v. Mendoza* (2011) 52 Cal.4th 1056,

“evidence of a ‘third party’ threat may bear on the credibility of the witness, whether or not the threat is directly linked to the defendant.” (*Id.* at p. 1084.)

Were we to assume the trial court erred by denying the motion for mistrial, appellant’s claim would fail under the applicable test for prejudice. The evidence of Tarola’s guilt was strong, if not overwhelming, and the defense case was quite weak in comparison. On this record, it is not reasonably probable that Tarola would have obtained a more favorable result but for the jury’s exposure to Mr. Escalante’s story about an ambiguous encounter with an unknown third party.

Insinuations of Gang Membership

Background

The relevance of Tarola’s alleged gang ties was another issue that arose during in limine proceedings. The prosecution advised the trial court that Mr. Escalante, immediately prior to being stabbed, had heard Tarola’s brother say, “This is for Eme.” According to the prosecutor, the word “Eme” was intended to be synonymous with the Norteno criminal street gang, and the statement put the attack in proper “context,” in addition to supporting its theory that Mr. Escalante feared retaliation for his testimony. Defense counsel opposed the introduction of any gang evidence. The trial court was persuaded that the evidence could be relevant to prove motive, but elected to defer its ruling until the prosecution laid a foundation for its use during the course of trial.

On direct examination, while describing his interaction with the defendant outside of the liquor store, Mr. Escalante volunteered that Tarola had used a slang expression which he understood to be “what Northerner gang members use[] to [greet] each other.” Defense counsel unsuccessfully moved to strike this testimony on relevance grounds. The prosecution did not call further attention to the comment, but eventually asked the victim if he remembered Tarola or his brother making any statements as they were stabbing him. Mr. Escalante answered “no,” which apparently dissuaded the prosecutor from attempting to introduce any evidence of a gang connection.

Under cross-examination, when asked about his prior encounters with Tarola's brother, Mr. Escalante took it upon himself to disclose that the brother once "tried to approach [him] as a gangster." Defense counsel asked if the brother's behavior had offended him, and the witness replied, "Yeah, because I don't like Northern gang members." Later, while the trial judge was having a sidebar conference with the attorneys, Mr. Escalante muttered the words "Northern gangster" from the witness stand. The trial court subsequently admonished the jury that any statements made by Mr. Escalante during the sidebar conference had not been properly received into evidence and were not to be considered for any purpose. The trial court also included an admonishment with respect to the victim's gang comments within its CALCRIM No. 303 limiting instruction.

Tarola claims the overtures regarding his supposed gang affiliations tainted the proceedings to the point where his constitutional right to a fair trial was violated. He urges that we review the alleged errors for prejudice under the standard articulated in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). Respondent contends that no error occurred.

Analysis

It is well settled that proof of gang membership can have a prejudicial impact on jurors, especially when the evidence has little or no relevance to the charged offenses. (*People v. Cox* (1991) 53 Cal.3d 618, 660, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) However, the erroneous admission of evidence results in a due process violation only when the material is so unduly prejudicial that it renders the trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Here, the only ruling subject to attack is the trial court's refusal to strike Mr. Escalante's comment about his familiarity with jargon used by "Northerner gang members." Assuming this was error, and even taking into account the victim's statements on cross-examination and during the side bar conference, we conclude that

admission of the challenged testimony was harmless under any standard of prejudice, and appellant's constitutional rights were not violated.

Tarola's attempt to analogize the facts of this case to those in *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*) is unavailing. The *Albarran* opinion addressed "one of those rare and unusual occasions where the admission of [gang] evidence has violated federal due process and rendered the defendant's trial fundamentally unfair." (*Id.* at p. 232.) There, a prosecutor had introduced evidence of the defendant's membership in a gang to substantiate certain enhancement allegations, but engaged in "overkill" by subjecting jurors to police testimony about the gang which "consumed the better part of an entire trial day." (*Id.* at p. 228 & fn. 10.) The testimony focused on the identities of other gang members, descriptions of unrelated criminal activity committed by other gang members, evidence of the gang's threats to kill police officers, and references to the Mexican Mafia, all of which was irrelevant to the underlying charges. (*Id.* at pp. 227-230.)

The decision in *Albarran* was based on the existence of "a real danger that the jury would improperly infer that whether or not [defendant] was involved in [the charged offenses], he had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general and thus he should be punished. Furthermore, [the] gang evidence was extremely and uniquely inflammatory, such that the prejudice arising from the jury's exposure to it could only have served to cloud their resolution of the issues." (*Albarran, supra*, 149 Cal.App.4th at p. 230, fns. omitted.) Therefore, "[g]iven the nature and amount of [the] gang evidence at issue, the number of witnesses who testified to [defendant's] gang affiliations and the role the gang evidence played in the prosecutor's argument," the majority of the appellate panel was not convinced beyond a reasonable doubt that the error did not contribute to the verdict. (*Id.* at p. 232.)

Here, the challenged evidence came before the jury because of the unilateral conduct of a complaining witness. The prosecution made no attempt to capitalize on the witness's behavior, i.e., the suggestion of Tarola's gang ties was never incorporated into its questioning of witnesses nor referenced in any way during argument to the jury. The potentially prejudicial impact of Mr. Escalante's comments was further mitigated by the trial court's admonitions, which included an instruction that any testimony concerning alleged gang involvement could not be considered as evidence of the defendant's guilt. We presume the jury adhered to those advisements. (*People v. Holt* (1997) 15 Cal.4th 619, 662 ["Jurors are presumed to understand and follow the court's instructions."].)

As for the evidence itself, the victim's scant references to a regional gang with which Tarola may or may not have been associated were unlikely to have had such an inflammatory impact that it motivated jurors to convict him regardless of whether or not they believed he was involved in the attack of Mr. Escalante. (See *Albarran*, *supra*, 149 Cal.App.4th at p. 230.) Again, the prosecution's case was objectively strong, and the defense case was objectively weak – almost to the point of being nonexistent. Based on all of these factors, it is evident beyond a reasonable doubt that the jury's verdict would have been the same had Mr. Escalante not made any type of gang references during the trial. The alleged errors were therefore harmless under both the *Watson* and *Chapman* standards.

Cumulative Error

Tarola claims the cumulative effect of the asserted errors deprived him of due process and a fair trial. Under the "cumulative error" doctrine, reversal of the judgment is warranted if it is reasonably probable that the outcome of the case would have been more favorable to him absent a combination of errors. (*People v. Holt* (1984) 37 Cal.3d 436, 458-459.) The facts and circumstances of this case, which included three essentially uncontroverted eyewitness identifications of Tarola as the perpetrator of the charged

crime, lead us to conclude that the errors alleged on appeal, whether considered individually or collectively, were harmless.

DISPOSITION

The judgment is affirmed.